No. 78-1878

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEBRING UTILITIES COMMISSION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor

ANDREW M. ZACK
Attorney
Federal Energy Regulatory Commission
Washington, D.C. 20426

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CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 591 F. 2d 1003. The opinions and orders of the Federal Power Commission[2] (Pet. Apps. C-1, C-2, C-3, C-4, and C-5) are not reported.

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[1]Unless otherwise indicated, all citations herein to the actions of the court of appeals and the Federal Energy Regulatory Commission will be to the appendices to the petition, cited as "Pet. App."

[2]Pursuant to the provisions of the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (to be codified as 42 U.S.C. 7101 *et seq.*), the Federal Power Commission ceased to exist on September 30, 1977, and most of its functions and regulatory responsibilities, including those relevant to this case, were assumed by the Federal Energy Regulatory Commission effective October 1, 1977. Hereinafter, the term "Commission" refers to the FPC or the FERC depending on whether the events referred to occurred before or after October 1, 1977.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1979. The petition for a writ of certiorari was filed on June 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission has authority under Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), to order that natural gas which a pipeline transports for others but does not itself own be included in the pipeline's plan for curtailing deliveries to its customers in time of shortage.

2. Whether allegations of anticompetitive impact can confer upon the Commission authority, which it otherwise lacks, to order that gas transported but not owned by a pipeline be included in that pipeline's curtailment plan.

STATUTE INVOLVED

Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), is set forth on page 3 of the petition.

STATEMENT

Florida Gas Transmission Company ("FGT") owns and operates a natural gas pipeline for the transportation of gas from the Gulf states to Florida pursuant to a certificate of public convenience and necessity issued by the Commission to FGT's predecessors-in-interest in 1956 (Pet. App. A-44). Under two types of rate schedules, providing for firm and interruptible gas service, FGT sells its gas to distribution companies which resell it (*ibid.*). FGT also makes direct sales (*i.e.*, sales not for resale) of gas it owns to industrial customers which also may purchase either interruptible or firm service (*ibid.*). The

petitioners ("Florida Cities") are municipal electric systems in the State of Florida and are all direct sale customers of FGT under interruptible contracts (Pet. App. A-88); two of the petitioners, the Fort Pierce Utilities Authority and the City of Starke, also purchase gas from FGT for resale under firm wholesale contracts with FGT (*ibid.*).

In addition, FGT transports gas owned by two electric utilities, Florida Power Corporation ("FP") and Florida Power and Light Company ("FPL"), both of which buy gas for their own use directly from natural gas producers at the wellhead in Texas (Pet. App. A-89).[3] Legal title to this "transportation gas" passes to the two electric utilities prior to its transportation by FGT (Pet. App. A-92).

Since it began operations in 1956, FGT has operated pursuant to a curtailment plan on file with the Commission (Pet. App. A-44). This tariff established a priority scheme for curtailing gas deliveries to FGT's direct sale and wholesale customers in time of gas shortages (*ibid.*).[4] None of the transportation gas owned by FP and FPL was curtailed under this plan (Pet. App. A-89).

In 1975, one of FGT's direct sale industrial customers, Lehigh Portland Cement Company, complained to the Commission under Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), that FGT's curtailment plan unlawfully discriminated against direct sale industrial customers in

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[3]FGT transports this gas under its transportation rate schedules T-1, T-2, and T-3, which are on file with the Commission (Pet. App. A-89).

[4]Under FGT's curtailment tariff, the company curtailed deliveries to its customers in the following order: (1) direct interruptible customers, (2) resale interruptible customers, (3) direct firm customers, resale firm customers, and transportation gas (Pet. App. A-44).

favor of otherwise similarly situated industrial users purchasing from FGT's distribution customers (Pet. App. A-42).[5] Florida Cities, which had intervened in opposition to the complaint, contended that if FGT's curtailment plan had to be revised, curtailments of the transportation gas volumes should be included (Pet. App. A-62). Subsequently, Florida Cities filed a complaint in a separate proceeding[6] requesting that the Commission (1) order curtailments of the transportation gas on FGT's system, and (2) condition further transportation upon curtailment of the transportation gas in accordance with the curtailment applicable to direct interruptible customers (Pet. App. A-88).

In Opinion No. 807, the Commission in the Lehigh Portland Cement Company proceeding (Pet. App. A-39 to A-63) found FGT's curtailment plan to be unduly discriminatory and ordered the company to file a new tariff that would provide equal treatment to direct and indirect customers who made similar end-uses of the gas (Pet. App. A-62 to A-63). In addition, the Commission ordered that gas transported by FGT for FP and FPL be considered in the formulation of the new curtailment plan (Pet. App. A-62).

Thereafter, in the Florida Cities' separate complaint proceeding, the Commission dismissed the complaint requesting curtailment of the transportation gas on the ground that such gas "is not owned by [FGT] and does not form a part of the system's gas supply from which gas can be allocated to its various customers" (Pet. App. A-92). On rehearing of Opinion No. 807, the Commission

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[5]FPC Docket No. RP75-79.

[6]FPC Docket No. CP77-147.

corrected the inconsistency between its orders in these two related proceedings and reversed its prior decision which had included the FP and FPL transportation gas in any new curtailment plan (Pet. App. A-74 to A-75).[7]

Upon review of the Commission's orders in both proceedings, the court of appeals affirmed (Pet. App. A-1 to A-35). The court rejected Florida Cities' argument that Section 1 of the Natural Gas Act, 15 U.S.C. 717, authorizes the Commission to curtail any gas that is transported in interstate commerce, regardless of who owns it (Pet. App. A-28 to A-34). The court held that "because FGT never owned the [transportation] gas, it could not be compelled to allocate it to others. The transportation gas has never been a part of the supply available to FGT for satisfaction of its sales contracts. We see no authority for making it so now" (Pet. App. A-34). In so ruling, the court distinguished *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972), and *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), on the ground that neither case had upheld Commission jurisdiction over gas not owned by a jurisdictional pipeline (Pet. App. A-30 to A-32). The court further held that allegations of anticompetitive effects do not alone confer jurisdiction over natural gas (Pet. App. A-35).[8]

ARGUMENT

The court of appeals correctly sustained the Commission's determination that it lacks authority to order that natural gas transported but not owned by a pipeline

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[7]It also affirmed its previous finding that FGT's curtailment plan was no longer just and reasonable, but allowed the existing plan to remain in effect pending further Commission action (Pet. App. A-76 to A-78).

[8]The court also sustained the Commission's finding that FGT's curtailment plan was unduly discriminatory (Pet. App. A-12 to A-28).

be included in the pipeline's plan for curtailing deliveries to its customers in time of shortage. The court also correctly ruled that petitioners' assertion of anti-competitive effect cannot serve to vest in the Commission authority it does not otherwise possess to order that transportation gas be included in a pipeline's curtailment plan. The decision below does not conflict with any decisions of this Court, nor is there any conflict among the circuits. Accordingly, review by this Court is not warranted.

1. Petitioners' contention (Pet. 11-18) that the jurisdictional holdings of the Commission and the court of appeals are contrary to *FPC* v. *Louisiana Power & Light Co.*, 406 U.S. 621 (1972); *California* v. *Southland Royalty Co.*, 436 U.S. 519 (1978); and *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), is incorrect. The court of appeals properly declined to extend this Court's holdings in those cases to allow the Commission to order curtailment of gas not owned but merely transported by a natural gas pipeline.

In *Louisiana Power & Light Co., supra*, the Commission had imposed an interim curtailment plan covering both direct and resale customers buying gas owned by the United Gas Pipe Line Company. The issue before the Court was "whether FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale." 406 U.S. at 631. The Court rejected the direct sales customers' argument that their sales were not jurisdictional and therefore could not be curtailed, holding that "the [Natural Gas] Act applies to interstate 'transportation' regardless of whether the gas transported is ultimately sold retail or wholesale." *Id.* at 636.

The court of appeals correctly distinguished *Louisiana Power & Light Co.* from the case at bar. As the court below observed: "The Supreme Court dealt only with the issue of whether the Commission could, independently of its sales jurisdiction, supervise curtailment of gas owned by a natural gas company" (Pet. App. A-30; footnote omitted). The transportation gas at issue here is owned by FP and FPL both prior to delivery to FGT and throughout the period of transportation (Pet. App. A-89 to A-92). FGT, which as the court of appeals held, "stands in the position of a bailee in relation to FP and FPL" (Pet. App. A-34), cannot sell the transportation gas to its customers; in contrast, the pipeline in *Louisiana Power & Light Co.* owned and could sell all of the direct sale and resale gas which the Court held to be subject to curtailment. The court of appeals thus properly refused to "extend the Court's holding [in *Louisiana Power & Light Co.*] to allow Commission-ordered allocation of gas owned by two companies that are not subject to Commission jurisdiction" (Pet. App. A-31).[9]

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[9]The court of appeals' holding is supported by the interpretation of *Louisiana Power & Light Co.* in *American Public Gas Association* v. *FERC*, 587 F. 2d 1089 (D.C. Cir. 1978). In its Order No. 533, *Policy with Respect to Certification of Pipeline Transportation Agreements*, the Commission had determined that, due to curtailments of relatively high-priority customers on many pipelines, it would under certain conditions certificate transportation arrangements involving sales of gas directly from producers to such high-priority users. On review, the court rejected an assertion that *Louisiana Power & Light Co.* required the Commission to include such transportation gas in curtailment plans (587 F. 2d at 1097-1098; emphasis in origial):

> [W]e do not believe that unlawful discrimination inheres in the fact that direct sale purchases are beyond the scope of pipeline curtailment plans. [Petitioner] is quite correct in observing that curtailment plans represent an exercise of the Commission's transportation jurisdiction rather that its rate jurisdiction. *See Federal Power Commission* v. *Louisiana Power & Light Co.*,

Petitioners' contention (Pet. 15) that *California* v. *Southland Royalty Co., supra*, undermines the court of appeals' decision is similarly without merit. *Southland* held that once gas has been dedicated under the Natural Gas Act to interstate commerce pursuant to a certificate of unlimited duration authorizing the sale and delivery of gas from a tract leased by the seller, "even expiration of the lease did not terminate the obligation to continue selling the gas in interstate commerce." *United Gas Pipe Line Co.* v. *McCombs*, No. 78-17 (June 18, 1979), slip op. 8. Rather, the Commission's permission to abandon the sale and service covered by the dedication must first be obtained. *Ibid.* The present case, however, does not involve abandonment of the continued sale and delivery of dedicated gas. A certificate limited to the transportation of gas purchased directly by the user does not effectuate a dedication of that gas within the meaning of *Southland* or Sections 1(b) and 7(b) of the Natural Gas Act, 15 U.S.C. 717(b) and 717f(b). "[T]hroughout the Act, 'transportation' and 'sale' are viewed as separate subjects of regulations." *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950). See also *FPC* v. *Louisiana Power & Light Co., supra*, 406 U.S. at 637 n.13.[10]

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406 U.S. 621, 641 * * * (1972). Nevertheless, the purpose of a curtailment plan is to prescribe the manner in which a pipeline that cannot meet its contractual commitments will curtail deliveries on its *own* gas.

Congress has recently confirmed the Commission's authority to certificate the transportation of user-owned gas for high-priority uses. See Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, Section 608, 92 Stat. 3173, discussed in note 12, *infra*.

[10]Under Section 2(18)(B)(i)(IV) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3354, the term "committed or dedicated to interstate commerce" does not include "natural gas sold in interstate commerce (within the meaning of the Natural Gas Act) * * * to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user."

Thus, this Court's holding in *Southland* that the Commission's authority over dedication and abandonment survives the expiration of the underlying private agreement is not controlling here, as the court of appeals held (Pet. App. A-34 n.57). Nothing in *Southland* empowers the Commission to order that FGT's customers be allocated gas that FGT does not own and could not otherwise sell to them.

Petitioners' reliance (Pet. 16-18) on *California* v. *Lo-Vaca Gathering Co., supra*, is also misplaced. That case involved purchases of gas by the El Paso Natural Gas Company from the Lo-Vaca Gathering Company and the Houston Pipe Line Company. The gas purchased from Lo-Vaca and Houston was limited by contract to El Paso's own nonjurisdictional use. Nevertheless, because these volumes of gas were commingled into a single stream, and thus at least a portion of this gas was in fact resold in interstate commerce, the Court held that the Commission had properly asserted rate jurisdiction over the entire amount purchased by El Paso.

As the court of appeals recognized (Pet. App. A-31), this Court in *Lo-Vaca* did not adopt a flat rule that commingling, by itself, establishes Commission jurisdiction for all regulatory purposes over all gas in an interstate pipeline. That issue was expressly reserved.[11] Rather, the Court was considering a jurisdictional pipeline that commingled jurisdictional and nonjurisdictional gas it owned and then sold for resale in interstate commerce a part of that commingled gas. Under these

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[11]The Court noted (379 U.S. at 370; footnote omitted):

> Whether cases could be conjured up where in spite of original commingling there might be a separate so-called nonjurisdictional transaction of a precise amount of gas not-for-resale within the meaning of the Act is a question we need not reach.

circumstances the Court refused to preclude Commission authority over the gas that was contractually designated for nonjurisdictional use, for to have done so would have enabled jurisdictional pipelines to discriminate in favor of their nonjurisdictional customers and to have insulated favored suppliers from federal regulation by attributing their gas to nonjurisdictional uses. 379 U.S. at 369-370. No such power of discrimination or attribution over gas owned by an interstate pipeline is involved here and the effective regulation of resale gas is not impaired. In addition, the transportation gas in the present case is owned by the two electric utilities, which are not natural gas companies under the Natural Gas Act. Thus, none of the factors relied on by the Court in *Lo-Vaca* is present. Accord, *American Public Gas Asociation* v. *FERC*, 587 F. 2d 1089, 1097 n.9 (D.C. Cir. 1978).

Petitioners are also in error in their contention that "[a]cceptance of [the court of appeals'] distinction would give parties the ability to contract out of FERC's regulatory jurisdiction, thereby creating the 'attractive gap' that this Court has stated many times the Act is intended to avoid" (Pet. 15). Petitioners fail to recognize that the extent to which users of gas purchase their own supplies at the wellhead, rather than from interstate pipelines, is a function of many factors beyond the control of the purchasers, including supply, price, and the cost of transportation. Petitioners also ignore that the rates for the transportation service are regulated by the Commission pursuant to Section 4(a) of the Natural Gas Act, 15 U.S.C. 717c(a). But, most importantly, petitioners overlook that the pipeline must obtain Commission

authorization under a standard of public convenience and necessity in order to transport the gas the user has purchased.[12]

The Commission has construed the Natural Gas Act, which it is charged to administer, as not conferring jurisdiction to order the curtailment of natural gas transported but not owned by a pipeline.[13] In the

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[12]Pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), the Commission has twice issued certificates of public convenience and necessity permitting FGT to transport gas to FP and FPL. See *Houston Texas Gas & Oil Corporation*, 16 F.P.C. 118 (1956), aff'd *sub nom. Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643 (D.C. Cir. 1957), cert. denied, 356 U.S. 959 (1958), and *Florida Gas Transmission Company*, 37 F.P.C. 424 (1967).

Although the Commission does not have authority to require that a pipeline include in its curtailment plan transportation gas owned by others, it may grant future transportation certificates on the condition that such gas not be put to low-priority uses. *Florida Power & Light Company* v. *FERC*, 598 F. 2d 370 (5th Cir. 1979). In this way, notwithstanding any underlying private arrangements, the Commission retains the power to adjust proposed end-uses of transportation gas in accordance with the priorities established as appropriate to the limits on the available gas supply. The Commission's authority in this regard has recently been confirmed by Congress in Section 608 of the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3173, which amended Section 7(c) of the Natural Gas Act to provide that "[t]he Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—(A) natural gas sold by the producer to such person; and (B) natural gas produced by such person." See also H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 118-119 (1978).

[13]In Section 303(d) of the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3385, Congress has given authority to the President, in certain extraordinary situations, to allocate user-owned natural gas. Such a recent and explicit authorization of emergency presidential powers to allocate user-owned natural gas is at odds with petitioners' contention here that there is general authority in the Commission to order curtailment of such gas.

Commission's view, its power to grant transportation certificates for the public convenience and necessity is adequate regulatory authority to promote the objectives of the Act in this respect. Petitioners' arguments to the contrary do not overcome the deference properly due an agency's considered interpretation of its own enabling legislation. See, *e.g.*, *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 420 (1973); *Investment Company Institute* v. *Camp*, 401 U.S. 617, 626-627 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. There is no basis for petitioners' alternative claim (Pet. 20) that their allegations of anticompetitive consequences are a sufficient predicate for the Commission to assert curtailment powers over transportation gas. Competitive considerations, where relevant, are to be appraised in "[t]he exercise by the Commission of powers *otherwise* within its jurisdiction * * *." *FPC* v. *Conway Corp.*, 426 U.S. 271, 279 (1976) (emphasis added). Cf. *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 758-759 (1973). Thus, the court of appeals correctly concluded (Pet. App. A-35 n.58):

> Although the FERC has a responsibility to consider anticompetitive impact in matters properly before it * * *, alleged anticompetitive effect, in and of itself, does not create jurisdiction over natural gas.

See also *Northern California Power Agency* v. *FPC*, 514 F 2d 184, 189 (D.C. Cir.), cert. denied, 423 U.S. 863 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

ROBERT R. NORDHAUS
General Counsel

HOWARD E. SHAPIRO
Solicitor

ANDREW M. ZACK
Attorney
Federal Energy Regulatory Commission

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